

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

THESIS PAINTING, INC.

and

Case 05-CA-167137

INTERNATIONAL UNION OF  
PAINTERS AND ALLIED TRADES,  
AFL-CIO, DISTRICT COUNCIL 51

*Clark C. Brinker, Esq.*, for the General Counsel.  
*Maurice Baskin (Littler Mendelson, P.C., Washington, D.C.)*  
for the Respondent.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Washington, D.C. on November 10, 2016. The Painters and Allied Trades Union, District Council 51 filed the charge on January 5, 2016. The General Counsel issued the complaint on March 31, 2016.

The Regional Director of Region 5 certified the Union as the exclusive bargaining representative of Respondent's full-time and regular part-time painters and lead painters on November 2, 2015.<sup>1</sup> The Union demanded bargaining 3 days later. The Board denied Respondent's Request for Review of the certification on March 24, 2016. Respondent then appealed the Board's decision to the United States Court of Appeals for the Fourth Circuit.

On December 8, 2015, Respondent laid off 5 painters. It laid off another painter on December 11, 3 more painters on December 28 and 1 more on January 18. Respondent did not notify the Union about the lay-offs either before or after they occurred. Respondent did not offer to bargain about the decision to lay-off or the effects of the lay-off. Moreover, Respondent has not recognized the Union nor offered to bargain with the Union about anything.

While Respondent declined to bargain with the Union primarily because it denied the legitimacy of its certification, this case presents an additional argument, "compelling economic circumstances." Respondent contends that an economic emergency justified its failure to notify

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<sup>1</sup> The Union won a representation election conducted on July 31, 2015.

the Union and offer it an opportunity to bargain over the lay-off decision or the effects of that decision.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

Respondent, a corporation, is a painting contractor based in Springfield, Virginia. In the 12 months prior to February 29, 2016, Respondent performed services valued in excess of \$50,000 outside the State of Virginia. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### *Respondent's worsening financial situation in 2015*

Respondent has been in business since 1995. It is a painting and wall covering contractor in the Washington, D.C. metropolitan area. Respondent operated at a loss for 8 of the 12 months of calendar year 2015, including 5 of the last 6 months of the year. Measured in terms of the number of hours Respondent's employees were working, 2015 was a much worse year than 2014, G.C. Exh. 13. For example, in the last week of July 2014, Respondent's employees worked 2,353 hours; in the last week of July 2015, they worked 1,140 hours. The number of hours worked by Respondent's employees in the week ending September 11, 2015 was 662, a drop of 478 hours since the last week of July 2015. In the comparable week in 2014, company employees worked 1,844 hours. Thus, Respondent's financial position was very poor months before the events in December 2015 on which it relies in claiming "compelling economic circumstances" that justifies avoiding notifying and bargaining with the Union about the December lay-offs.

Prior to December 2015, employees called an automatic system each day to find out whether they were working the next day, and if so where they were working. When the hours available to employees dropped, they simply received no work assignments for the next day. Thus, in late August-September 2015, employee Alba Moran received work assignments only once or twice a week.

#### *The events of December 2015*

In December 2015, Respondent's largest project was the Park Potomac Apartments project, a \$995,000 contract. The work on this project was slated to be completed by December 17, 2015. Respondent had two new projects slated to begin the same month.

On December 3, 2015, Hensel Phelps, the general contractor on one of these projects, at Fort Mead, Maryland, cancelled its \$706,000 contract with Respondent. Barbara Spyridakis,

Respondent's Chief Executive Officer, immediately called Henry Lloyd, a consultant, who had advised Thesis off and on since 2010. It is not clear exactly what advice Lloyd gave Spyridakis on December 3. She testified that he said that Respondent would have to cut expenses further than it had done already, Tr. 105, or "cut people." Lloyd's testimony is even less clear as to when he advised her that she must lay-off employees, Tr. 136-40. Lloyd and Spyridakis had telephone conversations after December 3 and he met with her face-to-face on December 14.

Respondent also had a contract to paint sprinkler pipes on the "Latitude Project." On December 4, Respondent learned that start date for this project was being pushed back from December 14 to March 7, 2016.

Respondent laid off 5 employees, all of whom had been working at the Park Potomac job on December 8. On December 14, it laid off 1 more of those employees, 3 more on December 28 and an additional employee on January 18.<sup>2</sup> The principal, if not only reason, Respondent did not notify the Union about the lay-offs was that it was contesting the Union's certification, Tr. 114-15.

### *Analysis*

Until such time as the Court of Appeals rules otherwise, the Board's certification of the Union is valid. Although an employer may properly decide that an economic layoff is required, once such a decision is made the employer normally must notify a union representing the unit of the effected employees, and upon request bargain with it concerning the lay-offs, including the manner in which the layoffs and any recalls are to be effected. When an employer is faced with dire economic circumstances, a union must request negotiations in a timely and speedy fashion. Otherwise, the employer will have satisfied its bargaining obligation. Moreover, the negotiations must occur in a timely and speedy fashion, *Lapeer Foundry and Machine*, 289 NLRB 952, 953-54 (1988).

An employer that fails to notify its employees' bargaining representative of a layoff, while challenging to the union's certification, acts at its peril, *Clement Wire*, 257 NLRB 1058 (1981). If the certification is upheld, the employer will be found to have violated Section 8(a)(5) and (1).

Notification and an offer to bargain over lay-offs may be excused in extraordinary circumstances. *Angelica Healthcare Services, Group*, 284 NLRB 844, 852-53 (1987). In the absence of precedent to the contrary, I will assume the defense of "economic exigency" is

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<sup>2</sup>The General Counsel moved to amend the complaint to include Emiliano Diaz because his name appeared on a subpoenaed list of employees laid off. Respondent in its brief asserts Diaz was not laid off. I rejected this contention. Respondent's claim that Freddy Robles quit and thus should not be on the list is supported by sworn testimony, Tr. 96. Its assertion about Diaz is not. Thus, I conclude that Diaz was laid off as indicated by G.C. Exh. 14.

available to an employer who has no intention to notify and bargain with the Union under any circumstances.<sup>3</sup>

Respondent herein was certainly faced with an economic emergency requiring prompt action, i.e., the sudden loss and postponement of the work expected in December 2015. However, this begs the question as to whether it was necessary for it to implement lay-offs without at least notifying the Union and offering the Union an opportunity to bargain over the lay-offs and the effects of the lay-off, such as the recall rights of the laid off employees.

Even assuming that prompt action was required, Respondent has not established that it was necessary to implement lay-offs. Instead, it could have continued its past practice at least until it had given the Union an opportunity to bargain. That practice was to have employees call in and discover that there was no work for them on a daily basis. Secondly, since Respondent had sufficient time to notify and consult with Henry Lloyd before implementing the lay-offs, it certainly had time to notify the Union and discuss the lay-off and its effects. As stated above, it is unclear when Lloyd advised Respondent that it must resort to lay-offs and the number of lay-offs he advised. Even assuming that the company did not have sufficient time to notify the Union about the lay-offs on December 8 and 11, it certainly had sufficient time to notify the Union prior to the December 28 and January 18 lay-offs.

Moreover, even if one were to excuse Respondent for not notifying and offering the Union an opportunity to bargain over the lay-offs, it certainly violated the Act in not offering the Union an opportunity to bargain over the effects of the lay-offs, such as recall rights.<sup>4</sup> In this regard, the record indicates that Respondent's economic fortunes have improved since December 2015. For example, the Latitude project appears to have commenced as rescheduled in March 2016, Tr. 104. There is no evidence that any of the laid-off employees were recalled to work on that project.

#### Conclusion of Law

Respondent, Thesis Painting, Inc. violated Section 8(a)(5) and (1) by failing to notify the Charging Party Union in advance of the lay-offs of December 8, 11, 28, 2015 and January 18, 2016. Respondent violated the Act in failing to give the Union the opportunity to bargain over these lay-offs and the effects of these lay-offs.

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<sup>3</sup> *Bottom Line Enterprises*, 302 NLRB 373 (1991) and *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995), pertain to situations in which an employer in the course of collective bargaining negotiations, is confronted with an "economic exigency." In such situations, the employer may not be required to wait until an impasse is reached before implementing a lay-off. However, in most cases, the employer would still be required to provide advance notice of the lay-offs to the union and the opportunity for speedy negotiations. These cases have little or no applicability to the instant case.

<sup>4</sup> Respondent appears to suggest that the Union waived its bargaining rights at page 6 of its brief. I reject such a suggestion. The company had made it clear long before December that it would not bargain with the Union about anything. Thus, it would have been a futile gesture for the Union to have specifically requested bargaining over the lay-off or its effects.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully laid-off Salvador Humberto Rodriguez, Jose Lorenzo Osorio, Orivel Betancourth, Alba Moran, Rubio Omar Diaz, Jose Inmar Viera, Jose Vicente Cantor, Francisco Otoniel Pacheco Martel, David Galindo and Emiliano Diaz, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

Respondent must also compensate these employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Respondent shall file a report with the Social Security Administration allocating backpay for these employees to the appropriate calendar quarters. Respondent shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>5</sup>

## ORDER

The Respondent, Springfield, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Laying off unit employees without first notifying the Union and giving it an opportunity to bargain.

- (b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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<sup>5</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Offer full reinstatement to Salvador Humberto Rodriguez, Jose Lorenzo Osorio, Orivel Betancourth, Alba Moran, Rubio Omar Diaz, Jose Inmar Viera, Jose Vicente Cantor, Francisco Otoniel Pacheco Martel, David Galindo and Emiliano Diaz to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

(b) Make Salvador Humberto Rodriguez, Jose Lorenzo Osorio, Orivel Betancourth, ASlba Moran, Rubio Omar Diaz, Jose Inmar Viera, Jose Vicente Cantor, Francisco Otoniel Pacheco Martel, David Galindo and Emiliano Diaz whole for any loss of earnings and other benefits suffered as a result of their unlawful lay-offs in the manner set forth in the remedy section of this decision.

(c) Compensate these employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

(d) File a report with the Social Security Administration allocating backpay for these employees to the appropriate calendar quarters.

(e) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum back awards, and file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Springfield, Virginia facility copies of the attached notice marked "Appendix" in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 5 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 8, 2015.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

5 Dated, Washington, D.C., January 31, 2017.

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Arthur J. Amchan  
Administrative Law Judge

## **APPENDIX**

### **NOTICE TO EMPLOYEES**

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### **FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

WE WILL NOT lay you off without giving your collective bargaining representative, International Union of Painters and Allied Trades, AFL-CIO, District Council 51, advance notification and an opportunity to bargain over the lay-off and its effects.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer full reinstatement to Salvador Humberto Rodriguez, Jose Lorenzo Osorio, Orivel Betancourth, Alba Moran, Rubio Omar Diaz, Jose Inmar Viera, Jose Vicente Cantor, Francisco Otoniel Pacheco Martel, David Galindo and Emiliano Diaz to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Salvador Humberto Rodriguez, Jose Lorenzo Osorio, Orivel Betancourth, Alba Moran, Rubio Omar Diaz, Jose Inmar Viera, Jose Vicente Cantor, Francisco Otoniel Pacheco Martel, David Galindo and Emiliano Diaz whole for any loss of earnings less any net interim earnings and search-for-work and interim employment expenses (regardless of interim earnings) and other benefits resulting from their lay-offs, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating these employees' backpay to the appropriate calendar quarters.

WE WILL compensate these employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.



THESIS PAINTING, INC.

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

Bank of America Center, Tower II, 100 S. Charles Street, Ste 600, Baltimore, MD 21201-4061  
(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/05-CA-167137](http://www.nlr.gov/case/05-CA-167137) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (410) 962-2864.